BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	CC Docket No. 95-185

REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

PETER ARTH, JR.
LIONEL B. WILSON
ELLEN S. LEVINE

Attorneys for the People of the
State of California and the
California Public Utilities Commission

505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-2047
Fax: (415) 703-2262

June 10, 1999

TABLE OF CONTENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	CC Docket No. 95-185

REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

The People of the State of California and the California Public Utilities Commission ("California") hereby file these reply comments, as allowed by the Second Further Notice of Proposed Rulemaking ("FNPRM") issued by the Federal Communications Commission ("FCC") in the above-referenced dockets.

I. THE FCC SHOULD CONSIDER SEVERAL THRESHOLD FACTORS IN ASSESSING WHETHER ALTERNATIVES TO THE INCUMBENT CARRIERS' NETWORK ELEMENTS ARE REASONABLY AVAILABLE

In their opening comments, a number of parties[1] have argued that the incumbent local exchange carriers ("ILECs") should not be required to provide network elements on an

[1] See e.g., Comments of SBC Communications Inc. at 20-80; Comments of GTE Service Corporation and its affiliated domestic telephone operating companies at 32-63; Comments of USTA at 17-45.

unbundled basis when some competitors are self-supplying comparable elements in the retail local exchange market. According to these parties, the ability of these competitors to supply these elements in the retail market is an indication that the elements are reasonably available outside the ILEC's network. California disagrees. As discussed below, the FCC should consider a number of factors to determine whether an ILEC should be required to provide unbundled network elements ("UNEs"), and should not rely on the mere presence of elements outside the ILEC's network in determining the availability of such elements to competitors. The absence of any of these factors may allow the ILEC to exert market power in the provisioning of network elements, with potential spill over and harm to the retail local exchange market.

Fundamentally, we recommend that the FCC consider the following: First, when determining whether a given ILEC network element should be unbundled, the FCC should consider whether non-ILEC providers are *actually offering* the network elements in the marketplace. The question of whether alternative providers *could* offer UNEs to competitive local exchange carriers ("CLECs) is speculative and is largely irrelevant to the inquiry of whether non-ILEC network elements are actually available for purchase by CLECs.

Second, in order to be viable alternatives, non-ILEC network elements must provide the CLEC with quality and reliability comparable to that of the ILEC's network elements. Reliance on network elements that are of inferior quality would materially diminish a CLEC's ability to compete with the ILEC in the provision of local exchange service.

Third, UNEs offered by alternative providers must be available on a commercial basis. In other words, CLECs must be able to obtain sufficient quantities of UNEs in a manner that will allow them to provide service on a commercial basis to their own end users, taking into account

expected demand for the CLECs' services.

Fourth, the FCC must consider the additional amount of time, e.g., the lead time needed to negotiate for and obtain network elements from alternative sources. Significant provisioning delays could prove fatal to CLECs attempting to win customers who are accustomed to quick service from the incumbent provider.

Fifth, the cost of obtaining needed elements from another source, including information costs, that is more than de minimis, is clearly relevant in assessing the availability of network elements to competitors.

All of these factors should be considered at a minimum in determining the reasonable availability of UNEs to permit viable competition.

II. THE FCC SHOULD REQUIRE UNBUNDLING THAT PROMOTES BROAD-BASED COMPETITION

A. Section 251 Imposes A Duty On ILECs To Interconnect With Any Requesting Carrier

A number of parties contend that various ILEC network elements should not be unbundled because some CLECs are self-provisioning the network elements or have collocation arrangements in some ILEC central offices. Some parties appear to recommend that the FCC focus on whether an "efficient" new entrant has a meaningful opportunity to compete by obtaining the element in question from a source other than the ILEC.[2] However, the FCC should not relieve an ILEC of its duty to unbundle a particular network element simply because a large, well-established CLEC may self-provision the element or because of the hypothetical viability of

[2] See, e.g., Comments of SBC Communications, Inc. at 7 and 21.

an "efficient" CLEC.

Section 251(c)(3) imposes on ILECs the duty to provide nondiscriminatory access to UNEs to "any requesting telecommunications carrier"--not "the largest CLECs" or "the established CLECs" or even "the efficient CLECs." Similarly, Section 251(d)(2) instructs the FCC to consider, in determining what network elements should be made available, the ability of "the telecommunications carrier seeking access" to provide service. The unbundling requirements in Section 251(c)(3), in conjunction with Section 251(d)(2), should be interpreted in a manner that provides CLECs, including small and start-up CLECs, a meaningful opportunity to compete. This includes access to cost-based ILEC network elements unless alternatives are reasonably available to a broad range of CLECs. In crafting these sections, Congress appears to recognize that viable competition will develop only through the combined efforts of many entrants. Rather than being viewed as protecting individual competitors, this interpretation brings benefits to the entire market, and ultimately, to consumers.

B. The Presence Of A Switch-Based Competitor Should Not Relieve the ILEC Of Its Duty To Unbundle

While the ability to enter markets on a start-up basis has been touted as a central benefit of resale, carriers can rely on the incumbent's network elements, in addition to resale, as a stepping stone to becoming entirely facilities-based. The inherent "lumpiness" of switch investment and the need to build an established customer base before a switch can be justified economically may cause a CLEC to need access to the ILEC's switching capabilities on a temporary basis, until market conditions warrant the deployment of a new switch.

The fact that a large or established CLEC has found it economical to deploy its own

facilities does not necessarily mean that a small or start-up CLEC will have the requisite customer base, resources and economies of scale or scope to do the same. Nor does it necessarily mean that the small or start-up CLEC will be able to obtain UNEs from alternative providers. An interpretation of Section 251(d)(2) that would preclude UNE-based entry once one CLEC has exhibited a willingness to build its own facilities would harm the development of competition, not just the viability of individual competitors.

Even if a CLEC were to deploy its own facilities in an area, that does not mean that it is economical to serve all customers in that area on a facilities basis. A CLEC's decision to deploy its own facilities may be based on a business plan that targets a specific group of customers, such as large business customers. The costs of serving the mass market on a facilities basis, e.g., the costs of connecting ILEC loops to a CLEC switch for small business or residence customers, could far outweigh the potential revenue stream associated with such provisioning. In such instances, the availability of ILEC UNEs could make feasible CLEC entry into market segments where competition would not develop otherwise.

C. The FCC Should Consider The Geographic Availability Of UNEs

A CLEC's decision to deploy its own facilities in a given geographic area cannot be interpreted to mean that the CLEC would not need ILEC UNEs in other geographic areas. A CLEC's decision to deploy facilities can be triggered by the CLEC's possession of the requisite customer base, resources and economies needed to justify such a decision. These criteria could not reasonably be expected to duplicate themselves in all geographic areas simultaneously.

In instances where alternative providers of UNEs exist, California recommends that the

FCC consider the geographic availability of such alternative providers when determining whether a given ILEC network element should be unbundled. The fact that a UNE may be available from alternative providers in some areas is not a sufficient basis for eliminating it from the national UNE list. If anything, the fact that a UNE is unavailable from non-ILEC sources in some areas (though it may be available in some areas) argues for keeping it on the national list. This is because inconsistent availability of UNEs would tend to impair a CLEC's ability to provide service on a widespread basis.

D. The FCC Should Consider Technological And Operational Constraints In Determining The Availability Of UNEs

The FCC must also consider whether network elements obtained from the ILEC are needed so that CLECs can access customers who are currently served by different technologies. Non-interchangeable technologies between the CLECs and ILECs would preclude the CLEC from competing with the ILEC for certain customers. For example, the lack of access to ILEC switching would preclude competitive service to customers served by remote switching modules, digital loop carrier ("DLC") technology, and digital subscriber line access multiplexers ("DSLAMs").[3]

Further, when considering whether an ILEC should be required to unbundle a specific network element, the FCC must consider whether the ILEC will allow a CLEC to connect network elements purchased from alternative providers to ILEC network elements. If an ILEC

[3] See, MCI Initial Comments at 56.

does not allow such an arrangement, the FCC cannot conclude that UNEs obtained from alternative providers will allow a CLEC to offer local exchange service in competition with the ILEC.

III. THE FCC SHOULD NOT ADOPT THE ESSENTIAL FACILITIES DOCTRINE IN DEFINING WHICH UNES MUST BE UNBUNDLED

A number of parties object to using the essential facilities doctrine to interpret the "necessary" and "impair" criteria in Section 251(d)(2). These parties[4] raise a number of legitimate arguments with which California agrees. Nothing in the Supreme Court's decision in AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999), or in Section 251(d)(2), requires the FCC to utilize the essential facilities doctrine to determine whether a network element should be unbundled. To the contrary, Congress intended that the 1996 Act would augment, not replace, traditional antitrust rules by creating statutory obligations on the part of ILECs to enhance competition in local markets while preserving existing statutory remedies under antitrust laws to prevent anticompetitive conduct .

To be sure, the essential facilities doctrine serves a different and much narrower purpose than Section 251. The essential facilities doctrine is designed to identify and address misuse of monopoly power. The doctrine imposes no duties on monopolists to enable competitive entry into the monopoly market. Section 251, on the other hand, is specifically designed to eliminate the monopoly provisioning of local exchange service and open the local exchange market to competition. It imposes specific duties on ILECs to promote entry by competitive carriers in the

[4] See, e.g., Comments of the Public Utility of Texas at 16-20; Comments of the Oregon Public Utility Commission at 2; Comments of Covad Communications Company at 17-22; Comments of AT&T Corp at 46-52; Comments of MCI WorldCom Inc at 28-37.

local exchange markets, including those duties set form in Section 251(c).

The essential facilities doctrine establishes a significantly more stringent standard than appears contemplated by the "necessary" and "impair" criteria set forth in Section 251(d)(2). Among other things, as noted by some parties, no "essential facilities" claim can be made whenever a facility can be duplicated. Moreover, the essential facilities doctrine does not consider the impact of the duplicated facilities on the potential competitors' costs, quality of service or ability to compete with the monopolist. In addition, the portion of the essential facilities doctrine requiring a potential competitor to bear the burden of demonstrating that the ILEC has already denied use of the element would present unreasonable barriers to the entry of potential competitor. The resulting costs and significant delays incurred by potential competitors in carrying this burden will only chill competitive entry into the local exchange market.

By not adopting an essential facilities requirement in the 1996 Act, Congress provided the FCC with the flexibility and discretion to interpret the terms "necessary" and "impair" in specifying unbundling obligations. California believes that the FCC should exercise this flexibility and discretion to interpret those terms in a manner that furthers the goals of Section 251 and the 1996 Act as a whole and not constrain itself by utilizing tools solely equipped to deal with anti-trust violations.

In short, the FCC should not adopt the essential facilities doctrine in implementing Section 251 of the Act. The FCC should also decline to consider criteria other than the "necessary and impair" criteria set forth in Section 251(d)(2) of the Act when determining which UNEs must be unbundled. Not only is there no legal requirement to consider additional criteria,

but also, as a matter of policy, additional criteria will only delay, not further, competition in the local exchange market.[5]

IV. THE FCC SHOULD ADOPT A NATIONAL LIST OF NETWORK ELEMENTS THAT INCLUDES AT LEAST THE SEVEN ELEMENTS PREVIOUSLY IDENTIFIED AND EXTENDED LINK CAPABILITY

As stated in our initial comments, we support the creation of a list of UNEs that, at a minimum, would be mandated on a national basis.[6] We also believe that the FCC's minimum national UNE list should include the original seven UNEs identified in the FCC's Local Competition Order as well the extended link (loop connected to interoffice transport) network element. Based on our experience to date in California, we see no market development that would justify or support findings that these network elements are reasonably available from alternative sources, considering the factors we have discussed above. In addition to the rationale we provided in our initial comments in support of unbundling certain network elements, we provide specific responses to parties' positions on the unbundling of local switching and network interface devises ("NIDs") below.

A. The FCC Should Specify Switching As A UNE

A number of parties[7] urge the FCC not to include local switching on a national UNE list.

---

[5] In addition, the FCC should not consider USTA's claims that unbundling requirements should be minimized because total element long run incremental costs ("TELRIC") based prices do not adequately compensate ILECs for the costs of their network elements. This claim is outside the scope of this proceeding. USTA's arguments were previously rejected by the FCC in its Local Competition Order and should be rejected again.

[6] CPUC Comments at 3-4.

[7] See, e.g., Comments of SBC Communications Inc. at 33-43; Comments of GTE Service Corporation and its affiliated domestic telephone operating companies at 39-48; Comments of USTA at 34.

They argue that local switches have been deployed by a number of CLECs and that switch vendors have begun making available scalable, low cost alternatives to an ILEC's unbundled local switch offering. They add that IXC switches, wireless switches and packet switches could also be utilized to offer local exchange service. California does not believe that this evidence is sufficient to warrant removal of unbundled local switching from a national UNE list, at this time, for a number of reasons.

As indicated by several commenters, the number of CLEC-provisioned switches compared to ILEC switches is miniscule and their geographic coverage is relatively limited. Further, CLEC deployment of switches is time-consuming and relatively expensive. In addition, there is no evidence that CLECs that own switches are making them available to would-be competitors on reasonable terms and conditions.

Access to unbundled local switching from the ILEC is essential to a CLEC's ability to provide broad-based, mass market service in competition with the ILECs. This is because nearly all loops are connected to the ILEC's switch and the costs associated with disconnecting those loops from the ILEC switch and connecting them to a CLEC switch are so high as to impair the CLEC's ability to pursue the mass market. These significant costs are attributable to the arrangements required to bring the loops to the CLEC's switch (including the costs of establishing collocated space, equipping that space with items such as digital loop carriers and multiplexers, deploying or leasing dedicated transport from the collocation space to the CLEC switch and managing and engineering these activities) as well as the costs associated with the manual process ("coordinated hot-cut") needed to transfer former ILEC customer loops to the CLEC switch. Moreover, the manual, slow and time-consuming coordinated hot cut process

cannot support broad-based mass-market entry because it cannot support the order volumes generated by such entry. Further, the coordinated hot cut process requires significant lead time, is error-prone and liable to cause prolonged service outages for a given customer. And, as previously discussed, lack of access to ILEC switches would preclude CLEC offerings to those customers served by technologies such as DLC.

Finally, removal of local switching from the minimum national UNE list would, *de facto,* remove shared transport from that list because the two are technically intertwined. This would be done without the benefit of an analysis as to whether removal of shared transport from the list would impair a CLEC's ability to compete with the ILEC for the provision of local exchange service. The FCC has previously found that new entrants need access to unbundled shared transport in order to compete effectively with incumbent LECs.[8]

B. The FCC Should Specify Network Interface Devices As A UNE

A number of parties[9] urge the FCC to remove the NID from any national UNE list. They argue that NIDs can be purchased at low costs from a number of locations. We do not believe that the price of the NID should be the sole consideration regarding whether or not it should be unbundled. We note that the costs associated with carrying out a site visit to each individual customer premises to install NIDs are high. That, coupled with the delay and customer inconvenience associated with a site visit, would likely impair a CLEC's ability to compete with the ILEC for residential and small business customers.

---

8 See Shared Transport Order at ¶ 34 and FCC Order Approving the Bell Atlantic/NYNEX Merger at ¶¶ 199-200.

9 See, e.g., Comments of SBC Communications Inc. at 32-33; Comments of GTE Service Corporation and its affiliated domestic telephone operating companies at 56-57; Comments of USTA at 35.

V. THE FCC SHOULD ALLOW THE STATES TO ADD UNES OR TO SUBTRACT UNES PREVIOUSLY ADDED AND SHOULD ESTABLISH PROCEDURES TO REVIEW THE NATIONAL UNE LIST

A. Additional State Unbundling Requirements

Some parties[10] urge the FCC to conclude that state commissions are precluded from requiring ILECs to unbundle network elements in addition to those specified on a minimum national list. We disagree. As explained in our initial comments in this proceeding, Rule 317 should be reinstated.[11].

B. Modification Of Unbundling Requirements

California believes that the FCC should be charged with removing a UNE initially included on the minimum national list. As stated in our initial comments, the creation of a national list of UNEs would allow multi-state competitors to create a national business plan and would facilitate the arbitration process in individual states.[12] However, we do support the states' ability to relieve ILECs of state-imposed unbundling requirements at a later date if conditions warrant.

We also support a process whereby the FCC would review the minimum national UNE list. This review process could be scheduled to commence within three years after the adoption of the minimum national list. During that review, the FCC could make modifications to that list to the extent that it finds that some UNEs on the list are no longer necessary under the established federal standards.

---

10 See, e.g., Comments of SBC Communications Inc. at 18-20.

11 CPUC Comments at 7-9.

12 CPUC Comments at 3-4.

We believe that an FCC review process should be in lieu of a date-certain sunset of the national UNE list, as recommended by certain parties. A sunset procedure would be arbitrary and would fail to take into account the actual state of development of alternative UNE providers. It would be based on untested assumptions about the degree of competition that is likely to develop in the local exchange market and the UNE market by the sunset date. We note that in the three years since the passage of the 1996 Act, there has been very limited movement in local exchange competition in California. This has been particularly true for residential and small business markets.

Moreover, an automatic sunset provision would significantly raise the entry barriers faced by CLECs. Even before the sunset date, the mere fact that an automatic sunset provision has been adopted would likely have a chilling effect on CLEC development, since CLECs would be less likely to pursue a business plan based on temporary access to the incumbent's network that will be revoked whether or not alternative sources of facilities develop. Further, a sunset date would increase litigation costs and cause delays in service provisioning even if CLECs succeed in having access to UNEs reinstated after they are sunsetted.

///

///

///

VI. CONCLUSION

For the reasons discussed here and in our opening comments, California urges the FCC to (1) consider the factors recommended by California in determining whether the presence of network elements outside the ILEC's network is sufficient to warrant relieving ILECs from their unbundling obligations, (2) identify a list of network elements that would be available on a national basis, and (3) include switching and extended links on the national list of mandated UNEs.

Respectfully submitted,

PETER ARTH, JR.
LIONEL WILSON
ELLEN S. LEVINE

/s/ ELLEN S. LEVINE

ELLEN S. LEVINE

Attorneys for the People of the
State of California and the
California Public Utilities Commission

505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-2047
Fax: (415) 703-2262

June 10, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon all known parties of record by mailing, by first-class mail, postage prepaid, a copy thereof properly addressed to each party.

Dated at San Francisco, California, this 10th day of June, 1999.

/s/ ELLEN S. LEVINE

ELLEN S. LEVINE